

## What is the Wright way to question potential jurors?

On a Monday morning in most circuit courts in Maryland, a visitor can observe the process of jury selection. Scores of potential jurors—dozens at a time, as many as 150— are brought from the jury assembly room to courtrooms for the questioning and selection process.

At this point, the trial judge faces the delicate and sometimes frustrating task of insuring that a fair and impartial jury is selected from a room full of people the judge and the parties know nothing about beyond their name, age, educational level and occupation. As a consequence, the potential jurors must be adequately questioned to discover grounds of disqualification or bias and the judge must conduct the process in a way that is fair to the parties, does not unnecessarily invade the potential jurors' privacy and completes it in a reasonable amount of time.

Judges have experimented with various methods of jury questioning and selection over the years, but the Maryland state trial judge has to be careful that the method chosen will survive appellate review, which in the past decade has become more exacting and less deferential to the trial judge's choices. If the method does not survive appellate review, the result will be a new trial, no matter how well the trial was otherwise handled. Additionally, other verdicts from juries selected through that same method can be subject to attack.

There are several methods of jury questioning commonly used in Maryland circuit courts (see box, below). But the list just got shorter: a recent Court of Appeals decision virtually eliminates one method and creates doubt about the standards that will be applied in future cases to a trial judge's decision on the form and substance of jury questioning, regardless of the method selected.

### Wright v. State

In *Wright v. State*, MD 2009 WL 3806078 (November 16, 2009), the judge had a 50-person venire panel brought to the courtroom for a drug distribution case.

The judge read the panel a list of 17 questions. The questions were standard ones for a criminal case, dealing with whether the potential juror knew the parties, counsel or witnesses,

whether he or she had been convicted or been a victim of crime, had any bias or prejudice due to the race of the defendant or the nature of the case, had any connection to law enforcement agencies, or would experience any hardship due to the length of the trial.

No responses were taken or noted until each juror was called up individually to the bench and asked if they had any response to the questions asked. Potential jurors who raised an issue were questioned about it and finally asked, individually, if he or she could be fair and impartial. Counsel were allowed to ask follow-up questions.

When defense counsel objected to the method on the grounds that the potential jurors would have difficulty remembering the questions, the judge stated that in his experience, the method was "an extremely effective way of accomplishing what is sought to be accomplished in the voir dire process. The jurors do remember the questions."

After examining each individual juror at the bench, 26 of 50 people on the panel were struck for cause and the jury was selected from the balance.

The only question before the Court of Appeals was whether the trial court's choice of voir dire method deprived Wright of a fair and impartial jury, as guaranteed to him by both the U.S. Constitution and the Maryland Declaration of Rights.

In striking the conviction and ordering a new trial, the Court of Appeals acknowledged that, under its rules, the trial judge has broad discretion in the conduct of voir dire that extends to both the form and substance of questions posed to the venire. That discretion, the court said, is exercised "only when the voir dire method employed by the court fails to probe juror biases effectively."

In Wright's case, though, the Court of Appeals felt that presenting a roster of questions without the opportunity

to answer each question as it was posed required each venire person to comprehend and retain far too much information to guarantee that the questions were answered properly.

The court's analysis focused on the number of questions (17), the time it took to read them (5-1/2 minutes) and the fact that no juror responded to any question until being called individually to the bench. The opinion noted that some jurors did not approach the bench until more than 30 minutes after reading the questions.

In evaluating the method, the court said it was "duty-bound in eliminating any doubt or error in the process, as much as is possible." It felt that the method used "may have obscured relevant information from the trial court's view by failing to ensure that the jurors on the venire made reasonably full disclosures."

To support its conclusion that the method was defective, the court cited only a footnote in a death penalty case, *Akeakota v. State*, 301 Md. 289 (2006). There, in dicta, the Court of Appeals suggested that a trial judge upon remand use a "better approach" in advising a mentally ill criminal defendant under the influence of psychiatric drugs about his waiver of jury sentencing. It advised the trial judge to break down his recitation of the elements of the waiver into "smaller intellectual bites," given the defendant's clear limitations. The court in the Wright opinion said that "the same principle governs this case."

The court made clear that it was not condemning the practice of asking questions of venire panel *en masse*. A trial judge who uses this approach, however, should either note affirmative responses by a show of hands (recorded by the judge or court personnel) or distribute a written list of the questions to the venire and allow them to note their responses in writing.

While the method used in Wright's case could have worked for many jurors, the Court of Appeals said, it was not ready to concede that those jurors are the "norm." The court felt it should use "an overabundance of caution, and assume that the judicial system as a whole is better served by a more careful process."

### What now?

Judge Joseph F. Murphy Jr. dissented, agreeing with the Court of Special Appeals' panel that the method, particularly given the care with which the judge examined each potential juror, created a reasonable assurance that prejudice would be discovered if present.

The dissent noted that the jurors did not have to remember all 17 ques-

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### COMMON METHODS OF JURY QUESTIONING IN MARYLAND

> Judge reads each question to the panel as a group. If there is an affirmative response to the question by a show of hands, each juror is asked at that time to approach the bench where the court in the presence of the parties and counsel will take the response and possibly ask other questions on the subject. The juror returns to his seat and after all jurors have responded, the judge asks the next question. A juror who does not give an affirmative response to any question is not brought up to the bench.

> Judge reads all the questions to the panel as a group. After each question is read, those with an affirmative response are noted by juror number. At the conclusion of the reading of all questions each juror who responded to any of the questions is brought up individually to the bench and questioned specifically about all the questions he responded to. A juror who did not respond to any of the questions is not brought up to the bench.

> Judge reads all the questions to the panel as a group. Responses are noted by the court at that time. After all the questions are read, each juror is brought up to the bench individually and asked if the juror has a response to any of the questions asked. If the answer is yes, the juror is asked to give his response. The judge and the lawyers may ask further questions of the juror at the bench. The Court of Appeals' November decision in *Wright v. State* has virtually eliminated this method.

> Judge reads all the questions to the panel as a group. Responses are noted. If there are a sufficient number of jurors who did not respond to any question which would allow the jury to be picked then the respondents are dismissed without being questioned and the jury is picked only from among the non-responders without any further individual questioning. This method is used by only a few judges in Baltimore City.

> In rare cases, the judge may use a written questionnaire that the potential jurors complete in advance of the in court jury selection. The judge and counsel review the questionnaire and conduct individual follow up with each juror as needed. At times an initial questionnaire can be combined with additional questions posed to the jurors in the courtroom using one of the above methods.

Judge Dennis M. Sweeney

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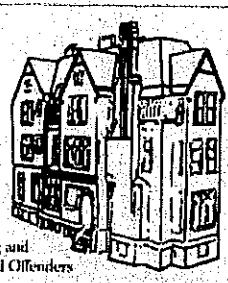
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# Judge on the jury

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## Sweeney > Recent decision leaves trial judges, lawyers with unanswered questions

Continued from DA

tions, but only the handful for which they had some positive response. While Judge Murphy agreed that a "better practice" would be to use the methods suggested by the majority, he could not conclude that the method chosen by the trial judge violated constitutional standards.

One can certainly agree with the majority and the dissent that a "better" method may have been available, but trial judges and attorneys are left by the majority opinion with great uncertainty.

"All of this would be possible, but to do it would cripple the current jury selection system in most Maryland jurisdictions."

No showing was made by Wright that any potential juror would have answered differently if a better method of voir dire was used. Instead, the appellant asked the Court of Appeals to make assumptions about what the "norm" would be for potential jurors.

The court made various assumptions about what a juror would be able to recall and retain over periods of time. These questions of perception, memory and recall of persons were resolved without reference or citation to the body of psychological or social science research on the subject that could have been of assistance.

In evaluating methods in the

future, should the trial judge give his questioning to the "average juror" or the least capable juror in the panel? Will the Court of Appeals continue to employ the metrics of timing the precise length of questioning and the delay between questions being asked and responses being given? If it does, what are the acceptable metrics? The answers are unclear.

At one point, the Court of Appeals said it must "eliminate any doubt or error in the process, inasmuch as is possible." In a perfect world, "to eliminate any doubt or error," the trial judge in every case would ask each question two or three different ways to each juror individually, probing and exploring any ambiguity. Jurors without an affirmative response would be

cross-examined by the judge or attorneys to ascertain the reason for their silence — that is, to make sure the juror understood the question and that he or she was not holding back due to shyness or confusion. The court could also be required to make certain that all words or terms used would be understood by the least educated or most intellectually challenged potential juror.

All of this would be "possible," but

to do it would cripple the current jury selection system in most Maryland jurisdictions.

What is also troubling about the Wright opinion is the importation into jury selection questioning of the standards established for advising a criminal defendant — a mentally ill defendant, at that — in waiving important constitutional rights.

That analogy leads down a path that will at a minimum be confusing and potentially create great uncertainty about how jurors should be questioned and their answers received.

Finally, the appellant attacking the jury selection method appears to have virtually no burden to show actual prejudice in his case. He can apparently argue that a single theoretical potential juror — possibly might have answered differently if a "better method" had been used. The appellant need not have evidence in the record to support his arguments. The trial judge's confidence in the method actually chosen, based on actual experience with it over time, seems to be accorded little deference and the attorney can assume it will be entitled to little weight.

Using the words of the Wright opinion, the appellant can argue that the appellate court should use an "over-abundance of caution" and "assume that the judicial system as a whole is better served by a more careful process" and that the method used must be "reasonably calculated, in both form and substance, to elicit all relevant information from prospective jurors" (emphasis added). If a better system can be postulated or imagined by the appellant, then — again using the language of Wright — the Court of Appeals would be "duty bound to eliminate any doubt or error in the process, inasmuch as possible" and reverse the jury's verdict and order a new trial.

### Avoiding the next test case

Hopefully, such arguments will not gain purchase with the Court of Appeals as future cases arise, or the Wright opinion will become an engine of destruction. But until there is further clarification, trial judges and lawyers will need to calculate how much the supposed "broad discretion" of trial judges in deciding on the form and substance of voir dire remains.

As this column has urged in the past, the trial judge would do best to work out, with the active involvement of counsel, both the form and substance of questioning so that there is no viable objection to how questioning is conducted.

Otherwise, the jury trial at hand could become the next test case of whether the language in the Wright opinion really means what it seems to say.

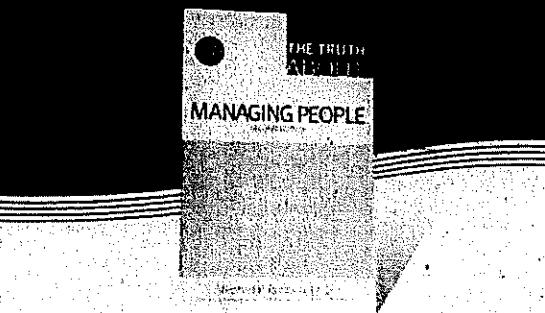
This column is 21st in an occasional series on jury trial issues by Howard County Circuit Judge Dennis M. Sweeney, retired, who chairs the Judiciary's Committee on Jury Use and Management. Judge Sweeney can be reached at [judgesweeney@me.com](mailto:judgesweeney@me.com).

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